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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

Nos. 17 and 18

No. 17

WALTER HUMPHREY, *et al.*,

Petitioners,

v.

C. W. MOORE, *et al.*,

Respondents.

No. 18

GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION No. 89,

Petitioner,

v.

C. W. MOORE, *et al.*,

Respondents.

ON A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY

REPLY BRIEF FOR PETITIONER IN CASE NO. 18

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In cases nos. 17 and 18 a brief has been filed by respondents C. W. Moore, *et al*, and in Case No. 17 a separate brief has been submitted by respondent Dealers Transport Company. We propose herein to respond to both of these briefs.

I

REPLY TO BRIEF OF DEALERS

A great deal of time and effort was spent by both respondents in the courts below emphasizing their belief that Dealers, as the employer of one of the two groups of employees involved in this case, was in a neutral position. The cloak of neutrality has fallen by the filing of Dealers' brief.

A. Notice to Dealers

Dealers now presents an argument which has never been presented before during these proceedings. The company states (on pages 4 and 5), that Dealers was not made aware of the position the union intended to take before the Joint Conference Committee[1] and states that had it been given such notice, its position "could possibly" have been against the dovetailing arrangement. This newly found argument has no factual foundation.

For Dealers had notice of the issue to come before the Committee, was actually present at the hearing, knew at that time precisely what the Union's position was, and had an opportunity to object. Instead of expressing objection or disagreement, Dealers was content to state the facts to the Committee and to remain "neutral." (R. 44, 48-49, 55-59).

Any implication in the brief that the Joint Conference Committee did not have the authority to bind Dealers by its decision must be rejected. By the collective bargaining agreement, this employer unequivocally agreed "to be bound

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[1] The committee which rendered the decision to dovetail seniority pursuant to the contract in this case is known as the Joint Conference Committee and not, as variously described in Dealers' brief, the "Joint Board" or the "Joint Grievance Committee" (See, e.g., Dealers brief, page 6).

by all of the terms and provisions of this Agreement, and . . . by the interpretations, and enforcement of the Agreement." (R. 13). This employer also agreed "to become a part of the multi-employer unit set forth in the Agreement." (R. 13). There is, of course, nothing in the record to indicate that Dealers had ever attempted to withdraw that authority or to extricate itself in any way from the collective bargaining agreement. Quite the contrary is true. As illustrated by the testimony of Mr. Snites, the Vice President and General Manager of Dealers, Dealers hastened to comply with the decision of the Joint Conference Committee immediately upon its issuance:

> 67. Now, that decision having been rendered, did you set about to put it into effect in Louisville?
>
> A. Yes, sir. The minute I got the decision I immediately got in touch with my Terminal Manager and my Personnel and Safety Manager and told them to comply with the decision, to post it on the bulletin boards so all could see it and to immediately begin to comply with the decision. (R. 44).

B. *Finality of Decision.*

A further argument is made to this Court for the first time, an argument which was not presented below and which the Court of Appeals of Kentucky would itself probably reject. The argument points to the fact that arbitration was the terminal step in the grievance procedure under Article VII and that because the instant dispute was not taken to arbitration, the decision of the Joint Conference Committee was not a "final decision." (Dealers brief, pages 6 and 7). Support for this proposition, says Dealers, may be found in this Court's decision in *Drivers Union* v. *Riss and Co.*, 9 L ed 2d 918 (1963). This particular argument completely misconstrues the force of the *Riss* decision and would upset the federal policy under Section 301. The argument is, in effect, that any decision rendered in any step of the grievance procedure,

whether by majority vote or unanimous vote, as was the case here, is unenforceable if there is one more step in the grievance procedure. Completely overlooked is the fact that in view of the unanimous decision of the Joint Conference Committee, arbitration was simply not available to any of the parties with respect to this dispute. Article VII, Section 2 (c) (R. 12) states that arbitration would be available if, but only if, "any grievance or disagreement is not satisfactorily settled, as provided above. . . ." A decision having been rendered unanimously by the Joint Conference Committee in this case, the dispute was conclusively ended. It is of no importance for purposes of Section 301 that the traditional method of "arbitration" was not utilized. That is precisely the holding in *Riss*. "The means chosen by the parties for the settlement of their differences under a collective bargaining agreement" which the Supreme Court said must be given "full play" was that grievances may be finally and conclusively settled by the bipartisan committee and that only failing agreement would it be necessary and proper to bring the matter to arbitration. *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 566 (1960). The confusion of respondent Dealers with respect to the holding in *Riss* might well stem from the following portion of the opinion:

> "Of course, if it should be decided after trial that the grievance award involved here is not final and binding under the collective bargaining agreement, no action under Section 301 to enforce it will lie." (9 L ed 2d at 920 to 921).

The foregoing refers to the fact that the contract in the *Riss* case provided that all matters of interpretation were to be referred to a bipartisan committee "for final decision." Thus, a question arose in the Court's mind as to whether decisions of that committee were intended by the parties to have a final and binding effect upon them; in short, whether the issuance of such a decision would by contract preclude the continuation of the dispute in other forums or by means of self help. Such a question does not exist in

this case. The contract here also provides that all matters of interpretation must be submitted to the Joint Conference Committee (Article VII, Section 2 (d); R. 12), but adds that "any decision of the . . . Joint Conference Committee shall be final and conclusive and binding upon the Employer and the Union, and the employees involved," (Article VII, Section 2 (e); R. 12), it being "the intention of the parties to resolve all questions of interpretation by mutual agreement." (Article VII, Section 2 (f); R. 13). Certainly, the *Riss* case was not intended to permit the argument that any and all settlements which are made at any step of a grievance procedure short of arbitration are to remain unenforceable, despite contractual agreement to the contrary, so long as arbitration or any higher step in the grievance procedure had not been utilized. The contrary contention of Dealers is wholly without merit.

C. *The Negotiated Agreement.*

In response to petitioner's principal argument that the determination of the Joint Conference Committee constituted a negotiated agreement between the parties and was therefore not subject to judicial review, Dealers argues (at p. 6) that the Joint Conference Committee had no right "to revise the contract in compliance with its decision" since the Committee "did not negotiate the contract." This argument too misses the point. The Joint Conference Committee made no attempt "to revise the contract." Rather, the representatives of the unions and employers, members of the multi-employer bargaining unit, who comprised the Joint Conference Committee simply carried out the mandate of Article IV, Section 5, of the contract that in cases of "absorption" the seniority of the employees shall be a matter for further negotiation between the parties. It does not matter that the Joint Conference Committee itself did not negotiate the original contract. Through Article IV, Section 5, the National Conference representing the unions and the Automobile Transporters Labor Division representing the employers authorized the bipartisan members of the Joint Conference Committee to carry out the necessary negotiations under that provision of the contract

in their behalf. Had the contract delegated such authority to a shop steward on the one side and a foreman on the other, the resulting determination would be no less a negotiated agreement and the result in this case would be no different. "Both the negotiation of a new employment standard and the administration of an existing one may be effected through the grievance machinery." Dunau, "Employee Participation in the Grievance Aspect of Collective Bargaining," 50 Col. L. Rev. 731, 733 (1950).

D. *Scope of Judicial Review.*

Finally, Dealers contends (at p. 6) as follows: "The lower court held there was no merger or absorption of the business of E&L by Dealers (R. 26). If this holding is correct, the Joint Board [sic] had no authority under Article IV, Subsection 5, to decree a merger of the two seniority lists." We submit, as stated in our original brief, pages 28 to 36, that the court had no right at all to review the result of the negotiation between the contracting parties. But even if the Joint Committee determination were not the product of negotiation, it is immaterial whether the state court interpretation of Article IV, Section 5, was "correct" simply because the state court had no right to undertake such an interpretation. As stated by this Court on so many occasions, "it is of course not open to the courts to reweigh the merits of the grievance." *Drivers Union v. Riss and Co.*, 9 L ed 2d 918-920 (1963).

II

REPLY TO BRIEF OF C. W. MOORE

1. The brief for the respondents C. W. Moore, *et al*, constitutes a rather confusing shotgun attack going to several issues presented by the petitioners in both cases. It demonstrates a lack of awareness of the meaning and application of federal law. "Let it be stated," says the brief, "that these respondents recognize and agree that the state court in determining the rights of respondents under this contract are bound by federal substantive law." (C. W. Moore Brief, page 11). The brief then proceeds to shatter federal substantive law in every respect. Thus, the brief

argues the facts to this Court intending to demonstrate that the merits of the grievance were wrongly decided by the Joint Conference Committee and correctly decided by the court below. This Court has observed, however, that "it is the arbitrator's construction that was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his." *United Steelworkers v. Enterprise Corp.*, 363 U.S. 593, 599 (1960).

Since, however, the facts mustered by respondents in support of their argument might tend to mislead, they are worthy of brief comment in reply. Respondents for the first time point to two contract provisions which do not appear in the designated record as supporting their own interpretation of Article IV, Section 5. The first of these is Article I, Section c, (at page 3). That provision comes into play only "when the employer needs additional men." That was not the situation in this case. The provision has nothing whatever to do with seniority in cases of absorption or merger. The second provision relied on is Article IV, Section 6, Subsection (b) 2 (at pages 3 and 24). It states that when a terminal closes employees may transfer to the terminal to which the work was transferred but shall at that terminal be placed at the bottom of the seniority list. Respondents' reliance on this clause overlooks a very vital distinction between Sections 5 and 6 of Article IV. Section 5 which formed the basis of the Joint Conference Committee determination obviously applies in the case of inter-company mergers or absorptions. Section 6, on the other hand, applies to intra-company transfers among and between its terminals. That distinction is the very reason why Local 89 was interested in finding out the nature of the transaction between Dealers and E&L in order to form its position as to which section of the contract would apply to that particular situation.

Attempting to show that there was no absorption in this case, respondents state (at page 4) that "Dealers did not take over any . . . business of E&L." However, in the very

sentence preceding it, they state that "Dealers took over certain secondary runs formerly held by E&L" and in the sentence immediately following they state that there was a payment "for all of the business taken over by Dealers from E&L." At page 7 of their brief, respondents state: "It is a reasonable assumption that it was the very efficiency of Dealers' employees that caused Ford to select that company for its business." The record, however, shows that no such selection was made:

> 26. Which one of the groups did Ford Motor Company select when they selected a carrier?
> A. Ford didn't select.
> 27. Is that right?
> A. That's right.
> 28. I was under the impression they had selected one.
> A. No, sir.

Relying on these incorrect facts, respondents proceed to draw inferences which would tend to support their own interpretation of the contract (brief of C. W. Moore, pages 13 and 14). Regardless of the correctness or incorrectness of their statement of facts, respondents demonstrate the very error committed by the court below. If federal law is indeed to be our guide, as it must, the resolution of these questions of fact, inferences, and interpretations was solely the function of the Joint Conference Committee and not of the respondents or the courts. *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960); *United Steelworkers v. Enterprise Corp.*, 363 U.S. 593 (1960); *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960).[2]

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[2] It would appear that much of respondents' error stems from their failure to distinguish between the concepts of "bargaining agent" and "bargaining unit" and the nature of a multi-employer multi-local union bargaining unit within the meaning of the NLRA. (See Brief for Petitioner in No. 18, pages 25 to 28). Thus, respondents state (at page 8) : "The bargaining unit for the employees of Dealers Transport supposedly was Local 89;" at page 18, they refer to "a burden upon the collective bargaining unit who is the chosen representative of employees." At page 20, they ask, "what bargaining unit was representing these respondents?"

2. One final word with respect to respondents' argument relative to hostile discrimination: respondents argue to this Court that whenever two groups of employees represented by the same union disagree and the union espouses the cause of one, the other has been, as a matter of law, denied fair representation. (Brief of C. W. Moore at page 20). The case relied upon is *Clark* v. *Hein-Werner Corp.*, 99 N.W. 2d 132, 8 Wis. 2d 264 (1960). A close reading of that case will demonstrate that the Wisconsin Court was concerned about an apparent lack of due process since a group of affected employees were not given specific notice and opportunity to attend the arbitration proceeding and present their position. There is no such situation present here. Insofar as dictum in the *Clark* case supports the respondents' argument, it is in plain conflict with the decisions of this Court and the underlying policies of the Act. As stated by this Court in *Ford Motor Co.* v. *Huffman*, 345 U.S. 330, 337-338 (1953):

> Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected.

See also the comments of outstanding observers in labor law at pages 32 to 35 of Petitioner's Brief. In effect the respondents, by making this contention, would have this Court convert its previous requirement of a showing of hostile discrimination in cases where the union's representation has been challenged into a *per se* doctrine which is unsupported by reason or the realities of collective bargaining.[3] An outstanding commentator has effectively summed up the *Hein-Werner* dictum as follows:

> The effect of this dictum is to neutralize the union on every question of contract interpretation concerning

[3] *Clark* v. *Hein-Werner* stands in part for what Prof. Aaron has called a "highly unrealistic doctrine." Aaron, "Reflections on the Legal Nature and Enforcement of Seniority Rights," 75 Harv. L. Rev. 1532 (1962).

which the opinion of its membership is not unanimous—that is to say, on almost every issue. One would be hard put to find a better recipe for undermining union responsibility and promoting general anarchy within the plant community. Aaron, "Some Aspects of the Union's Duty of Fair Representation," 22 Ohio State Law Journal 39, 51 (1961).

Respectfully submitted,

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